146 U S 227

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1434~~ 1040

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY, APPELLANT,

vs.

THE DISTRICT OF COLUMBIA ET AL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED NOVEMBER 5, 1888.

POINT VI.

We therefore ask that the decision of the Circuit Court be affirmed and this appeal dismissed:

1. Because in view of the state of the art, especially shown in the Clay street hill cable road, the respondent was justified in the building and use of its cable road.

2. Because it is conclusively shown that the invention in controversy was abandoned to the public and was in public use for more than two years prior to the application for the patent in suit.

All of which is respectfully submitted.

HERBERT KNIGHT,
Of Counsel for Appellee.

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27

No. ~~1434~~ 1040 ~~702~~ ~~28~~

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JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 8, 1888.

1 *Original Bill.* (*Filed Oct.* 23, 1884. *R. J. Meigs, Clerk.*)

In the Supreme Court of the District of Columbia.

THE WASHINGTON & GEORGETOWN RAILROAD COMPANY
vs.
THE DISTRICT OF COLUMBIA and JOSEPH R. WEST, JAMES B. EDMONDS, and GARRETT J. LYDECKER, Commissioners of said District.

9189, Equity Docket 24.

The above-named complainant, The Washington and Georgetown Railroad Company, respectfully states:

First. That it is a corporation duly organized under and by virtue of an act of Congress approved May 17th, 1862, entitled "An act to incorporate the Washington and Georgetown Railroad Company," and that it is engaged in the business of transporting passengers on its street railroads, propelled by horse power, in the city of Washington, and it exhibits this bill in its own behalf. The defendant, The District of Columbia, is a municipal corporation duly organized by virtue of various acts of Congress, and the other defendants, West, Edmonds, and Lydecker, are Commissioners of the District of Columbia, charged by law with the management and conduct of its business and the execution of the municipal ordinances in force in said District.

2 Second. That the complainant, soon after its incorporation, in 1862, constructed double tracks leading from the navy-yard, in the city of Washington, along Eighth street southeast and along Pennsylvania avenue to the city of Georgetown and thence into the city of Georgetown along Bridge street, and also from Boundary street to the foot of Seventh street southwest, and also a single-track railroad from Fifteenth street, along New York avenue, to Fourteenth street; thence along Fourteenth street northwardly to Boundary street. Said lines of railroad were equipped according to the provisions and requirements of the said act of Congress, and have ever since been maintained and operated as a first-class passenger railroad. It has from time to time paid out large sums for grading, paving, and repairing the public streets adjacent to its said lines of railroad, and has paid all taxes lawfully assessed upon and against its property since its organization.

Third. That the said act of incorporation contained numerous provisions regulating the manner of conducting the business of the said corporation and touching the reciprocal duties of the municipal corporations of Washington and Georgetown, on the one side, and of the said railroad company, on the other. Amongst other things, the said statute requires that the said company shall use first-class cars, with all modern improvements, on said lines, and that it shall run the same thereon every five (5) minutes during the day, except on Seventh and Fourteenth streets, on which streets the company is required to run cars every fifteen (15) minutes, each way, and as

much oftener as public convenience may from time to time require. It also prohibited the municipal authorities of the corporation of Washington and the corporation of Georgetown from doing any act or thing to hinder, delay, or obstruct the operation of the said railroad as by said act authorized.

3 Fourth. That the municipalities of Washington and Georgetown were abolished by the act of Congress of February 21st, 1871. The first Legislative Assembly convened and in pursuance of the said last-mentioned act of Congress enacted an ordinance entitled "An act imposing a license on trades, business, and professions practiced or carried on in the District of Columbia." By the twenty-sixth (26) paragraph of the twenty-first (21) section of said ordinance said Legislative Assembly undertook to impose a license tax of six (6) dollars each upon street car used in the District of Columbia. The said paragraph is in the words and figures following, to wit: "The proprietors of hacks, cabs, and omnibusses, and street cars, and other vehicles for transporting passengers for hire shall pay annually as follows: Hacks and carriages, ten dollars; one-horse cars, six dollars; omnibusses, ten dollars; street cars, six dollars; or other vehicles capable of carrying ten passengers or more at one time, ten dollars." By the fourth section of the said ordinance the said Legislative Assembly undertook to impose a fine or penalty of not less than five (5) nor more than fifty (50) dollars for each car upon every railroad company failing to pay said license. In pursuance and in execution of the provisions of the said ordinance the municipal authorities of the District of Columbia have at various times harassed and annoyed, and still continue to harass and annoy, the officers and agents of the complainant in the discharge of their duties to the complainant and in their efforts to comply with the peremptory requirements of the charter of the company; and unless the said defendants shall be restrained by the injunction of this court they will probably continue to annoy and harass the said officers and agents.

Fifth. That some time prior to August 28th, 1877, the Commissioners of the District of Columbia presented to the police court

4 an information, according to the practice of that court, against the complainant, alleging a violation of the said provisions of the said ordinance, and sought to have fines imposed upon the said company for failure to pay the license tax aforesaid. On or about the said 28th day of August, 1877, the police court adjudged the complainant guilty of the charges contained in said information and imposed a fine therefor. From this judgment an appeal was taken to the criminal court of the District of Columbia, which court had power to hear and determine said appeal. Said appeal was brought on for hearing, and, having been fully argued by counsel in behalf of both parties, the said court, expressing the opinion that the Legislative Assembly had no power to impose such a license tax upon the complainant, dismissed said information; which judgment is and was, as the complainant is advised, final, and that no appeal could be taken therefrom.

Afterwards, and some time prior to April, 1882, another informa-

tion, with like charges and allegations, was by said municipal authorities presented to said police court, upon which a like judgment was rendered and a like fine imposed. From this judgment also appeal was taken to the criminal court, and thereupon and afterwards, on the 4th day of April, 1882, the information in that case was dismissed or withdrawn by the attorney for the District of Columbia.

On or about the 20th day of September, 1884, the said municipal authorities caused two informations to be presented to the police court, each containing charges and allegations like unto the informations theretofore presented to said court, one of which is intended to cover the period from the 1st day of July, 1883, to the first day July, 1884, and the other to cover the period from the first day of July, 1884, to the 20th day of September, 1884, each of which informations complains of the use by the complainant of about one hundred street cars without having paid license therefor under said act of said Assembly. These two causes are now pending and undecided in said police court, but the said municipal authorities threaten to proceed to judgment, and the complainant fears that said court will again render judgment against it and impose burdensome and harrassing fines upon it and issue harrassing and unlawful writs by way of execution of its judgment.

A true copy of each of said informations last mentioned are herewith filed and referred to as part of this bill.

Sixth. That the complainant is advised by counsel and believes, and therefore avers, that the said ordinance of the said Assembly, so far as it attempts to impose said license tax, is unlawful, null, and void, because the imposition of such a tax was in contravention of the said act of incorporation of the complainant company and in excess of the powers granted by the Congress of the United States to the said Assembly; that the complainant is required by the said charter to pay taxes in the manner set forth and expressed in the said charter, and that the imposition of such a tax is unlawful for the further reason that it is forbidden by the fundamental rules of property governing taxation in the District of Columbia and in the State of Maryland up to February 27th, 1801.

That even if said provisions of the said act of the Assembly ever were of force and valid they have been since repealed by an act of Congress, approved July 12th, 1876, and also by an act of Congress, approved March 3d, 1877, entited "An act for the support of the government of the District of Columbia for the fiscal year ending June 30th, 1878, and for other purposes." The (11th) eleventh section of said act of Congress last mentioned is in the words and figures following, to wit: "That the capital stock of all corporations in said District not herein exempted shall be appraised in bulk by the assessor, and the corporation issuing the same shall be liable for the tax thereon according to such value, and the shares in the same shall not be assessed against the individual owners thereof; but from the appraised value of the stock shall be first deducted the value of any real estate of said corporation in said District, which shall be separately taxed against said corporation."

Seventh. That, in pursuance of the provisions of the said eleventh (11th) section of said act of Congress last above set forth, the said Commissioners of the District of Columbia proceeded to value the stock of said company, and imposed a tax upon the complainant of one dollar and fifty cents ($1.50) on every one hundred dollars ($100.00). The capital stock of the complainant consists of ten thousand shares, of the par value of fifty ($50.00) dollars; that the said Commissioners valued each of said shares at one hundred ($100.00), being one hundred per cent. (100 per centum) more than the par value thereof, such tax so imposed amounting altogether to the sum of fifteen thousand dollars, and said tax was promptly paid by the complainant after each assessment. The taxes imposed upon the real estate of the complainant by the said Commissioners were also paid promptly.

Eighth. That the complainant is now and has been during the year 1884 running one hundred and six cars (106), sixty-four (64) of which are two horses and forty-two (42) of which are one-horse cars. The complainant has always insisted that said tax was unlawful, and has refused to pay it ever since July, 1876, and if it shall be held to be a lawful tax the amount which would probably be computed and charged against the complainant by the said municipal authorities would reach nearly, if not quite, the sum of fifty-two hundred dollars, besides interest, fines, and penalties.

Ninth. The complainant therefore says that if the said defendants are not restrained and enjoined by the order of this court from annoying and harassing its officers and agents it will be irreparably
7 injured in its business and welfare, and that it is without remedy at law adequate or complete.

That, according to the rules of practice established for the police court, causes therein instituted can go no farther than the criminal court, the judgment of which last-mentioned court in such causes being final and conclusive, and that inasmuch as the questions involved in the said causes now pending in the police court were fully argued by counsel and considered by said criminal court and decided adversely to the municipal authorities, the complainant ought to be protected from multiplicity of suits and harassing and annoying writs.

To the end, therefore, that the complainant may be protected from vexatious litigation, multiplicity of suits, and unlawful prosecutions, it prays as follows:

Prayers.

1. That the writ of subpœna, in due form of law, may be issued to the District of Columbia, and Joseph R. West, James B. Edmonds, and Garrett J. Lydecker, the defendants in the above-entitled cause, requiring them and each of them to answer the exigencies of this bill.

2. That the writ of injunction may be issued by this court restraining and forever enjoining the said District of Columbia, Joseph R. West, James B. Edmonds, and Garrett J. Lydecker, and each of them, their officers and agents and attorneys, from prosecuting the

said actions in the said police court, or either of them, and also from instituting any other like actions for like purposes in said court, and also from attempting in any manner, directly or indirectly, to collect said license tax mentioned and described in the said twenty-sixth (26th) paragraph of section twenty-one (21) of the said act of the Legislative Assembly of the District of Columbia, ap-
8 proved August 23d, 1871, and also from charging up or entering upon the books of said municipal corporation against the complainant any sum or sums on account of said license tax.

3. That the complainant may have such other and general relief as may be according to equity and good conscience.

WASHINGTON & GEORGETOWN RAILROAD CO.,
Per H. HURT, *President.*

ENOCH TOTTEN, *Sol'r for Compl't.*

DISTRICT OF COLUMBIA, }
County of Washington, } *ss:*

I, Henry Hurt, being first duly sworn, depose and on my oath say that I am the president of the Washington and Georgetown railroad, and that I have read the foregoing bill by me subscribed, and that the charges and allegations therein contained are true to the best of my knowledge and belief.

HENRY HURT.

Subscribed and sworn to before me this 23d day of October, A. D. 1884.

R. J. MEIGS, *Clerk,*
By L. P. WILLIAMS, *Ass't Cl'k.*

9 *Information.* (*Filed Oct.* 23, 1884. *R. J. Meigs, Clerk.*)

DISTRICT OF COLUMBIA, *ss:*

In the Police Court of the District of Columbia. (September Term, 1884.)

Filed with and as part of the original bill.

James E. Padgett, Esq., special assistant attorney for the District of Columbia, who for the said District prosecutes in this behalf in his proper person, comes here into court and causes the court to be informed, and complains that the Washington & Georgetown Railroad Company, late of the District aforesaid, on the first day of July, in the year A. D. one thousand eight hundred and eighty-four, and on divers other days and times between the said first day of July and the day of filing this information in the District aforesaid, did engage in the business, being the proprietor of sixty-four two-horse street cars and forty-four one-horse street cars, and used and operated

for the conveyance of passengers for hire within the said District without having first obtained a license so to do, contrary to and in violation of an act of the late Legislative Assembly of the District of Columbia entitled "An act imposing a license on trades, business, and professions practiced or carried on in the District of Columbia," and providing for the enforcement and collection of fines and penalties for carrying on business in the said District without license, approved August 23, A. D. 1871, and the amendments to the said act, approved June 20, A. D. 1872.

JAMES E. PADGETT,
Special Ass't Attorney for the District of Columbia.

10 Personally appeared Joseph Carter this 20th day of September, A. D. 1884, and made oath before me that the facts set forth in the foregoing information are true.

H. S. PRINCE,
Clerk of the Police Court of the District of Columbia.

Information. (*Filed Oct. 23d, 1884. R. J. Meigs, Clerk.*)

DISTRICT OF COLUMBIA, *ss:*

In the Police Court of the District of Columbia. (September Term, 1884.)

(Filed with and as part of the original bill.)

Albert G. Riddle, Esq., attorney for the District of Columbia, who for the said District prosecutes in his behalf in his proper person, comes here into court and causes the court to be informed and complains that the Washington and Georgetown Railroad Company, late of the District aforesaid, on the first day of July, in the year A. D. one thousand eight hundred and eighty-three, and on divers other days and times between the said first day of July and the thirtieth day of June, in the year A. D. one thousand eight hundred and eighty-four, in the District aforesaid, did engage in the business of being the proprietor of sixty two-horse street cars and thirty-eight one-horse street cars used and operated for the conveyance of passengers for hire within the said District without having first obtained a license so to do, contrary to and in violation of an act of the
11 late Legislative Assembly of the District of Columbia entitled "An act imposing a license on trades, business, and professions practiced or carried on in the District of Columbia," and providing for the enforcement and collection of fines and penalties for carrying on business in the said District without license, approved August 23, A. D. 1871, and the amendments to the said act approved June 20th, A. D. 1872.

ALBERT G. RIDDLE,
Attorney for the District of Columbia.

Personally appeared Joseph Carter this 20th day of September, A.

D. 1884, and made oath before me that the facts set forth in het foregoing information are true:

H. S. PRINCE,
Clerk of Police Court of the District of Columbia.

Summons to Answer.

In the Supreme Court of the District of Columbia.

WASHINGTON & GEORGETOWN RAILROAD COMPANY, Complainant,
against
THE DISTRICT OF COLUMBIA, JOSEPH R. WEST, James B. Edmonds, and Garrett D. Lydecker, Defendants.
No. 9189, Equity Docket 24.

OCTOBER 23D, 1884.

The President of the United States to the District of Columbia, Joseph R. West, James B. Edmonds, and Garrett J. Lydecker, defendants:

You are hereby commanded to appear in this court at its
12 first special term occurring twenty days after service of this subpœna and answer the exigency of the complainant's bill, under pain of attachment and such other process of contempt as the court shall award.

Witness D. K. Cartter, chief justice.

[SEAL.]

R. J. MEIGS, *Clerk, &c.*,
By L. P. WILLIAMS, *Ass't Clerk.*

Rule to Show Cause. (*Filed Oct. 23d, 1884. R. J. Meigs, Clerk.*)

Supreme Court, District of Columbia.

W. & G. R. R. Co.
vs.
DISTRICT OF COLUMBIA *et al.*
Eq., 9189.

Upon consideration of the bill and exhibits in this cause and upon motion of Enoch Totten, sol'r for complainant, it is, this 23d day of October, 1884, ordered that the defendants show cause, if any they have, on Tuesday, the fourth day of November, 1884, at the opening of court on that day, or as soon thereafter as counsel can be heard, why they should not be enjoined and restrained as prayed in said bill.

W. S. COX, *J.*

13 *Answer to Rule to Show Cause.* (*Filed Oct. 29th*, 1884. *R. J. Meigs, Clerk.*)

In the Supreme Court of the District of Columbia. In Eq.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY
vs.
THE DISTRICT OF COLUMBIA *et al.* } No. 9189.

For answer to the rule to show cause, &c., issued in the above-entitled cause, these defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true in manner and form as the same are therein set forth, do demur thereto, and for cause of demurrer show that the said complainant hath not in and by its said bill stated such a case as doth or ought to entitle it to any such relief as is thereby sought and prayed for from or against these defendants.

Wherefore and for divers other errors and imperfections these defendants demand the judgment of this court whether they shall be compelled to make any further or other answer to the said bill of complaint or any of the matter and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

A. G. RIDDLE,
Attorney for Def'ts.

I, James B. Edmonds, a Commissioner of the District of Columbia and a party defendant, do solemnly swear that the above demurrer is not interposed for delay.

J. B. EDMONDS.

14 Subscribed and sworn to before me this 28th day of October, 1884.

[SEAL.] WILLIAM TINDALL,
Notary Public.

I hereby certify that in my opinion the above demurrer is well founded in point of law.

A. G. RIDDLE,
Att'y for Def'ts.

Decree in Special Term. (*Filed Nov.* 23, 1886. *R. J. Meigs, Clerk.*)

In the Supreme Court of the District of Columbia, Holding a Special Term in Equity.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY, Complainant,
against
THE DISTRICT OF COLUMBIA, JOSEPH R. WEST, James B. Edmonds, and Garret J. Lydecker, Defendants.
} Equity No. 9189.

This cause coming on for consideration by the court on the bill of complaint and the demurrer of the defendants thereto, and being by the court considered, it is, this 23rd day of November, A. D. 1886, adjudged, ordered, and decreed that the said demurrer be, and it hereby is, sustained, and that the said bill of complaint be, and it hereby is, dismissed with costs; and from this decree the complainant, in open court, appeals to the court in general term.

CHARLES P. JAMES, *Justice.*

15 *Appeal to General Term.* (*Filed Nov.* 23, 1886. *R. J. Meigs, Clerk.*)

In the Supreme Court of the District of Columbia.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY
vs.
THE DISTRICT OF COLUMBIA.
} Eq., 9189.

And now comes the said complainant and appeals to the general term from the decree of the equity court entered on the 18th day of November, 1886.

ENOCH TOTTEN,
Sol'l'r for Compl't.

Appeal Bond to Gen. Term. Filed Nov. 23, 1886.

In the Supreme Court of the District of Columbia, the — Day of November, 1886.

THE WASHINGTON AND GEORGETOWN R. R. Co., Complainant,
vs.
THE DISTRICT OF COLUMBIA, Defendant.
} Equity No. 9189.

The complainant, having appealed to the general term from the decree pronounced herein on the 18th of November, 1886, in the equity court, and Henry Hurt, surety for said appeal, for themselves

and each of them, their and each of their heirs and personal representatives, appearing and submitting to the jurisdiction of the said general term, hereby undertake to abide by, perform, and pay its judgment, which they agree may be pronounced against all of them.

WASHINGTON & GEO'TOWN R. R. CO.,
Appellant,

Per H. HURT, *P't.* [SEAL.]
H. HURT, *Surety.*

Surety sufficient.

H. E. DAVIS,
Ass't Att'y, D. C.

Approved 23 Nov., 1886.

CHAS. P. JAMES, *J.*

16 *Opinion of the Court. Announced Monday, Oct.* 22, 1888, *by Mr. Chief Justice Bingham.*

In the Supreme Court of the District of Columbia. In General Term.

THE WASHINGTON & GEORGETOWN R. R. Co. *vs.* THE DISTRICT OF COLUMBIA *et al.* } No. 9189, Eq. Dock. 24.

This is a bill in equity in which the complainant shows that it is an incorporated company for the purpose of constructing, maintaining, and operating a street railway in the District of Columbia; that this railway has been constructed and is being operated by the complainant. It shows that at the time of the granting of the charter there were certain provisions in the charter itself as to taxation of the property of the company, and avers that in 1871 the Legislative Assembly of the District of Columbia passed an act by which this company and all others in the District were to obtain a license and were to pay for each one-horse car $6 and each two-horse car $10.

Mr. RIDDLE: If the court will permit me, that was an un-
17 fortunate misprint that was not corrected in the record. There is but one amount—$6 for each car. Pardon me for the interruption.

The CHIEF JUSTICE: I believe you corrected that in your argument.

By the fourth section of this act the Legislative Assembly provided for a fine or penalty of not more than $50 upon each car for every railroad company failing to pay said license fee.

It is averred that in 1877 the Commissioners of the District presented to the police court an information, according to the practice of that court, alleging a violation of the provisions of this act on the part of the defendants; that the defendants were found guilty in the police court; that appeal was taken to the criminal court of the

District of Columbia, which court at that point of time had power to hear and determine an appeal; that in the criminal court the appeal was dismissed for the reason, as is averred in this bill, that the court found that the Legislative Assembly had no power whatever to enact such a law; that afterwards, in April, 1882, another information, with like charges and allegations, was filed in the police court of the District; that there the defendants were found guilty, and an appeal was taken to the criminal court of the District, and in that court the attorney for the District dismissed or withdrew the prosecution.

It is then alleged that in 1884, a short time previous to the filing of this bill in this case, the municipal authorities caused two
18 informations to be presented to the police court, each containing charges of allegations like the information theretofore prosecuted, and because of the filing of those informations this bill is filed, in which they aver—

1. That this act of the Assembly of the District is in excess of the power granted to it by Congress, and is, therefore, of no effect.

2. They aver also that the provision for collecting the license fees, which provision I have recited, has been repealed by subsequent acts of Congress in which they have undertaken specifically to provide for the manner of taxing street railway companies in this District.

It is complained that this is double taxation; that they are taxed, first, upon the capital stock which represents all of their property, including these very cars upon which it is sought to collect a license fee, and that the collection of such a fee is double taxation, and therefore not to be sustained.

Finally, the complainant says—

That if the said defendants are not restrained and enjoined by the order of this court from annoying and harassing its officers and agents it will be irreparably injured in its business and welfare, and that it is without remedy at law, adequate or complete.

That, according to the rules of practice established for the police court, causes therein instituted can go no farther than the criminal court, the judgment of which last-mentioned court in such causes being final and conclusive, and that, inasmuch as the questions involved in the said causes now pending in the police court were fully argued by counsel and considered by said criminal court and decided adversely to the municipal authorities, the complainant ought to be protected from multiplicity of suits and harassing and annoying writs.

19 And the complainant then prays that the defendants may be restrained.

To this bill a demurrer was interposed by the defendants because that the said complainant has not in and by its said bill stated such a case as doth and ought to entitle it to any such relief as is prayed for.

Whatever might have been the question presented to the special term, it would appear from the opinion of the judge holding the court at that time that no question was made about the right of the

plaintiff to file this bill in the special term. The case was decided in special term upon the merits of the bill and the grounds alleged in the bill for relief.

But upon the hearing of this case in this court the question was suggested—not urged, however, by counsel on either side, but it is one which the court cannot overlook—whether this court has jurisdiction to entertain a bill in equity to restrain the prosecution to recover a penalty by a criminal information.

Authorities were cited by counsel—a doubt having arisen in the minds of the court at that time and a suggestion having been made to counsel—but every authority produced, after having been sought for by counsel, relates to the restraining of the party from bringing a civil action, and we understand the counsel have been unable to find any case where a court of equity has proceeded to restrain criminal prosecutions or prosecutions in the nature of criminal cases with a proper penalty. According to our understanding that has
20 never been done in a court of equity. There is, we think, an apparent reason for it. Courts interpose to prevent multiplicity of suits and vexatious litigation by private parties who are presumed to be actuated either by desire of gain or to gratify their own malice; but prosecutions in the nature of criminal prosecutions are not conducted by private parties; they are conducted by officers of the State representing the public and looking to public interests and in their official capacity, and it would not be proper for a court of equity to undertake to restrain an officer under such circumstances, acting in his official capacity and under the responsibilities of his office, from discharging that which to him might appear to be a plain duty pertaining to his office.

For this reason we think the demurrer should be sustained.

We have serious doubt in this case whether the grounds urged for maintaining this bill are such that they could not be urged in defense of these prosecutions. Seeing that so far the defendant has been successful in a court of last resort and that there has been only one real instance where it has been determined by litigation, we hardly think that even if we had jurisdiction the plaintiff could be said to be in a condition that *he* could complain that *he* has suffered for a long time or to any very great extent. There were only two suits; one of those was determined by the action of the court and the other by the withdrawal by the officer representing the prosecution. Inasmuch as the defense sought to be inter-
21 posed here as a reason for the action of a court of equity could well be made in those prosecutions and ought to be determined by courts in which those prosecutions were depending, we think the complainant was not in this court under such circumstances as that the court ought to entertain the bill.

The demurrer, therefore, to the bill will be sustained; the decree of the court below dismissing the bill and sustaining the demurrer will be affirmed.

22 *Decree of General Term. Filed October 25th, 1888.*

In the Supreme Court of the District of Columbia. In General Term.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY *vs.* THE DISTRICT OF COLUMBIA and JOSEPH R. WEST, James B. Edmunds, and Garrett J. Lydecker, Commissioners of said District.	9189, Equity Docket 24.

This cause came on to be heard in the general term on appeal from a decree of the special term, and was argued by counsel, and the court being of opinion that it is without jurisdiction in equity of the matters and things in the said bill contained, it is thereupon, this 25th day of October, 1888, ordered, adjudged, and decreed that the said decree of the special term dismissing the bill be, and the same is hereby, in all things affirmed with costs.

Appeal.

From this decree the complainant, by its counsel, in open court appeals to the Supreme Court of the United States, which is allowed.

E. F. BINGHAM,
Chief Justice.

23 *Appeal Bond to the Supreme Court of the United States. Filed Oct. 29, 1889.*

In the Supreme Court of the District of Columbia, the 29th Day of October, 1888.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY *vs.* THE DISTRICT OF COLUMBIA and JOSEPH R. West, James B. Edmonds, and Garrett J. Lydecker, Commissioners of said District.	Equity No. 9189.

Know all men by these presents that we, the Washington and Georgetown Railroad Company and Henry Hurt, are bound unto the above-named defendants in the sum of five hundred ($500) dollars, to be paid to the said The District of Columbia; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 27th day of October, 1888.

Whereas the above-named The Washington and Georgetown

Railroad Company has prosecuted its appeal to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named The Washington and Georgetown Railroad Company shall prosecute its said appeal to effect and answer all damages and costs if *he* shall fail to make good *his* plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

WASHINGTON & GEO'TOWN R. R. CO. [SEAL.]
H. HURT. [SEAL.]

Sealed and delivered in presence of—
C. M. KOONES.

Approved Oct. 29, 1888.

W. S. COX, *J.*

24 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 1st day of November, 1888.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk,*
By L. P. WILLIAMS,
Assistant Clerk.

Endorsed on cover: District of Columbia supreme court. No. 1434. The Washington & Georgetown Railroad Company, appellant, *vs.* The District of Columbia *et al.* Filed November 5, 1888.

146 US227

FILED
OCT 8 1892
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1892.

THE WASHINGTON & GEORGETOWN RAILROAD COMPANY, APPELLANT,
v.
THE DISTRICT OF COLUMBIA, ET AL.

No. 27.

BRIEF FOR APPELLANT.

ENOCH TOTTEN,
W. D. DAVIDGE,
For Appellant.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1892.

Railroad Company has prosecuted its appeal to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia;

Now, therefore, the condition of this obligation is that if the above-named The Washington and Georgetown Railroad Company shall prosecute its said appeal to effect and answer all damages and costs if *he* shall fail to make good *his* plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

WASHINGTON & GEO'TOWN R. R. CO. [SEAL.]
H. HURT. [SEAL.]

Sealed and delivered in presence of—
C. M. KOONES.

Approved Oct. 29, 1888.

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THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY, APPELLANT,

v.

THE DISTRICT OF COLUMBIA ET AL.

No. 27.

Brief for Appellant.

The bill in this case was filed for the purpose of restraining the officers of the municipal corporation of the District of Columbia from attempting to collect an illegal license tax on street cars, and the penalties for non-payment of such tax, and the question presented is, whether or not the District of Columbia may lawfully collect, in addition to all other taxes, an annual *license tax* on each street car used by the complainant.

The bill alleges that two previous prosecutions at law of like character had been instituted, one of which was decided in favor of the company by a court of last resort, and it prays an injunction to restrain the defendant from further molesting the complainant.

I.

The officers of the District insist that the imposition and collection of this tax is authorized by law. An act of the legislative assembly entitled "An act imposing a license on trades, *business*, and professions, practiced or carried on in the District of Columbia," approved February 21, 1871, the 26th paragraph of section 21 of which act imposes a license tax on street cars is relied upon. That statute or by-law contains twenty-four sections. The twenty-first section is divided into forty-eight separate clauses, each clause specifying the terms of a license for a particular kind of business. These clauses are separable and separably operative, having no particular relation to each other. Those parts of the act which have reference to the questions here involved are as follows, to wit:

"AN ACT imposing a license on trades, business, and professions practiced or carried on in the District of Columbia.

"*Be it enacted by the legislative assembly of the District of Columbia*, That no person shall be engaged in any trade, business, or profession hereinafter mentioned until he shall have obtained a license therefor, as hereinafter provided.

"SEC. 2. * * *

"SEC. 3. * * *

"SEC. 4. *And be it further enacted*, That every person liable for license tax, who failing to pay the same within thirty days after the same has become due and payable, for such neglect shall, in addition to the license tax imposed, pay a fine or penalty of not less than five nor more than fifty dollars, and a like fine or penalty for every subsequent offense. * * *

* * * * * * *

A demurrer was filed (R. 8) in behalf of the District of Columbia to the bill, and this having been sustained by the court in special term the bill was dismissed, and from this decree an appeal was taken to the general term (R. 9). The court in general term, without passing upon the merits, decided that the court had no jurisdiction, and on that ground affirmed the decree of the court in special term (9, 10, 11, 12, 13). From the decree in general term an appeal was taken to this court (R. 13).

Assignment of Errors.

1. The supreme court of the District of Columbia erred in deciding that a court of equity was without jurisdiction in this cause and in dismissing the bill.
2. By denying the relief prayed for in the bill.

"SEC. 21. *And be it further enacted*, That a license tax shall be, and hereby is, imposed as follows—that is to say:

* * * * * * *

"Twenty-sixth. The proprietors of hacks, cabs, and omnibuses, and street cars, and other vehicles for transporting passengers for hire, shall pay annually as follows: Hacks and carriages, ten dollars; one-horse cabs, six dollars; omnibuses, ten dollars; street cars, six dollars, or other vehicles capable of carrying ten passengers or more at one time, ten dollars."

An act of said legislative assembly approved June 20, 1872 (Laws of 1872, ch. 50, p. 60), amended the foregoing license law, and also in the second section thereof specified the manner of collecting the penalties for violations.

The said second section is as follows, to wit:

"SEC. 2. *And be it further enacted*, That all the penalties or fines imposed or in any manner created by this act, or the act of the legislative assembly, entitled 'An act imposing a license on trades, business, and professions practiced or carried on in the District of Columbia,' approved August twenty-three, eighteen hundred and seventy-one, shall be recovered in the police court of said District, on information, under oath, filed therein by the attorney of the District, or his assistant, in the name of the District of Columbia, and in the same manner as was provided for in section sixteen of an act of Congress of the United States entitled 'An act to establish a police court for the District of Columbia,' approved June seventeen, eighteed hundred and seventy, for the recovery of fines and penalties for the violation of ordinances of the late corporations of Washington, Georgetown, and the levy court: *Provided*, That when any penalty shall be allowed in part to the informer the judgment or finding of the court shall set forth that it is for the District, and indicate the amount or proportion thereof which shall go to and be for the informer."

Reliance is also had on a provision found in an act of

Congress entitled "An act to incorporate the Metropolitan Railroad Company in the District of Columbia," approved July 1, 1864 (13 Stat., 326). This provision makes that company "liable * * * to license for their vehicles or cars," and then provides "that all other corporations in the District of Columbia heretofore organized for like purposes shall be subject to pay license as provided in this section."

In these two enactments is found all the authority possessed by the Commissioners of the District to collect this tax. If it exists, it is a very burdensome imposition; when this bill was filed there were 106 cars in use by the complainant, 64 of which were two-horse, and 42 one-horse cars. The tax assessed on the whole franchise, business, and property of the company, exclusive of its real estate, amounted in 1884 to $15,000.00, the capital stock being then appraised at the rate of $150.00 on each $100.00 in shares.

It is contended in behalf of the company that, whatever may be said of other kinds of "business," such a tax was not intended by the law-making power to be collected from this company since the new system of taxation was established in this District. It is submitted to the Court that upon a fair interpretation of the legislation of Congress on the subject this double and unjust imposition cannot be upheld.

By the two acts of Congress approved July 12, 1876, and March 3, 1877 (19 Stats. 86 and 400), a new mode of assessing the property, franchises, and privileges of corporations was established in this District; this mode is applicable only to corporations. The provisions of the two acts above mentioned on this subject are identical, and are in the following language, to wit:

"That the *capital stock* of all corporations in said District not herein exempted shall be appraised in bulk by the assessor, and *the corporation issuing the same* shall be liable for the *tax thereon* according to such value and the shares in the same shall not be assessed against the individual owners thereof; but from the *appraised value* of the stock shall be first deducted the value of any real estate of said corporation in said District, which shall be separately taxed against said corporation."

This statute has been construed as intended to effect the object of levying and collecting a tax in bulk upon all the property of the corporations, including the franchise and privileges. If this construction be correct it cannot properly be called a tax on the *shares* in the hands of individual stockholders; it is that and more than that. It is a tax on all such shares, and it is a tax on the corporation itself. The words "capital stock" have been in several cases distinguished from the expression "shares of capital stock," and also have been limited to that which was paid in to the corporation by the stockholders. See—

Farrington v. *Tenn.*, 95 U. S. 679.
Van Allen v. *Assessors*, 3 Wall. 575.
Del. Tax Cases, 18 Wall. 206.

The capital stock of a moneyed corporation represents all the property of the company, and, like the property of an individual, constitutes a fund for the payment of its debts. It is a trust fund of which the directors are the trustees, and it is to be managed during the life of the corporation for the benefit of the stockholders, or for the benefit of creditors in case of insolvency.

Upton *v.* Tribilcock, 91 U. S. 45.
Cook on Stocks, &c., p. 3.
Williams *v.* W. U. Tel. Co., 93 N. Y. 188.

The supreme court of Massachusetts said on this subject:

"But the *market value* of the shares of a corporation, or the aggregate value of all the shares, *by which we understand the cash price for which the shares will sell in the market*, does not necessarily indicate the actual value or amount of the property which a corporation may own. The price for which all the shares would sell may greatly exceed the aggregate of the corporate property, or it may fall very far short of it. Undoubtedly the amount of property belonging to a corporation is one of the considerations which enter into the market value of its shares; but such market value also embraces other essential elements. It is not made up solely by the valuation or estimate which may be put on the corporate property, but it also includes the profits and gains which have attended its operations, the prospect of its future success, the nature and extent of its corporate rights and privileges, and the skill and ability with which its business is managed. In other words, it is the estimate put on the potentiality of a corporation, on its capacity to avail itself profitably of its franchise, and on the mode in which it uses its privileges as a corporate body, which materially influences and often controls its market value. (See *Commonwealth* v. *Hamilton Manufacturing Co.*, 12 Allen, 302; affirmed by Supreme Court, U. S., 6 Wall. 632–641.)

The language found in this statute appears to have been designed to comprehend every interest of every person in the property appertaining or belonging to the corporation, whether it consisted in property tangible or speculative, or in franchise privileges, and in both the *capital stock* and the *shares* of capital stock. The language is that "the corporation issuing the same," *i. e.*, the capital stock, "shall be liable for the tax thereon according to such value"—that is to say, the value put upon this capital stock by the appraisement in bulk made by the assessor. The stat-

ute then proceeds to exempt the "*shares in the same*" from assessments "against the individual owners thereof," thus clearly showing that the intent of the law-making power was to levy and collect a tax on everything valuable in the corporation belonging either to the corporation or to its stockholders. The stock of this company is limited by law to five hundred thousand dollars, and the full amount has been issued; if only half of it had been issued, that part unissued could not, under this statute, have been assessed. (Boston & Al. R.R. Co. *v.* Commonwealth Mass., 1892.)

Accordingly, when the assessor approached his duty of appraising this "capital stock," in pursuance of this statute, he did not seek the charter of the corporation to ascertain at what sum the capital stock was fixed; if he had he would have found "that the capital stock of said company shall not be less than three nor more than five hundred thousand dollars" (12 Stat. 390), but, as appears from the bill, he went into the market and inquired touching the value of the stock there, and from such information he appraised the "capital stock" from 1878 to 1888 at $1,000,000.00.

This statute itself provides against *double taxation* upon the property of the owners of the capital stock. The expression "capital stock" at its market value, as has been said, not only includes all the property of the corporation, but includes the value of all the privileges and franchises, the capacity and skill to use them, and also any speculative value which may be given to the stock by prospective increases in income. The real estate is, of course, included in the valuation required by this law; but, to avoid taxing the real estate twice, the statute requires that the assessed value of the real estate shall be first deducted.

It cannot be asserted in support of the defendant's position that this is not a tax on the privileges

or franchises of the company, but that it is a "regulation." The authorities are full on this subject. It has been said that, "concerning useful trades and employments, a distinction is to be observed between the power to 'license' and the power to 'tax.' In such cases the former right, unless such appears to have been the legislative intent, does not give the authority to prohibit, or to use the license as a mode of taxation, with a view to revenue, but a reasonable fee for the license and the labor attending its issue may be charged." (Dillon on Municipal Corporations, § 291.)

The language used by the court in its opinion in the case of the *Mayor, &c.*, v. *Second Avenue R. R. Co.* (32 N. Y. 273) is instructive on this point. The court, in that opinion, says, in discussing the act imposing a license tax in New York city on street cars, that "there is nothing for the railroad corporation to do but to pay to the mayor the sum of fifty dollars annually for each car, and receive in return a license or certificate that the money has been paid. The ordinance imposes no duties to be observed by the company or its servants but the single act of paying the money. * * * The only act enjoined by the ordinance in question is the payment of the fifty dollars, and the only act which it forbids and prohibits is the running of the cars without the payment of the money. If the legislature should by law require every head of a family throughout the State to pay to the collector the sum of twenty dollars, and take his receipt therefor, it would be a fiscal measure, an expedient to replenish the treasury, not a regulation of police prescribing a rule of action and conduct. So with this ordinance, call what it requires, by the name of license or certificate of payment, or anything else, its primary and, indeed, only purpose is to take from the company, under coercion of the penalty

which it imposes, the sum of fifty dollars annually for each car run upon the road for the benefit of the city."

It is, therefore, submitted that, since the act of Congress above cited, any other tax upon this company than that described therein was forbidden. Instead of there being any implied authority for double taxation the implication is clearly against it.

The officers of the defendant rely upon the provisions of section nineteen of the act Congress approved July 12, 1876 (19 Stat. 88), as affirming or continuing in force the license tax in question here. That section is in the following words, to wit:

"That the twenty-third section of the act of the legislative assembly of the District of Columbia, entitled 'An act imposing a license on trades, business, and professions practiced or carried on in the District of Columbia,' approved August twenty-third, eighteen hundred and seventy-one, clauses twenty, and thirty-five of the twenty-first section of said act, and clause sixteen of said twenty-first section of said act as amended by the act amendatory thereof, approved June twenty, eighteen hundred and seventy-two, and all other laws and acts, or parts thereof, inconsistent herewith, be, and the same are hereby, repealed."

The 23d section of the act of the legislative assembly referred to in the above section relates to the tax on personal property exclusively; clause 20 of section 21 imposed a tax or license fee on "dealers in merchandise;" clause 35 required photographers to "pay annually twenty dollars," and clause 16 imposed a license fee on wagons, carts, drays, and hand-carts; the amendment to said clause 16, made by the act of the legislative assembly, approved June 20, 1872 (Laws of 1872, p. 61), merely changed the amount of the license fee.

The effect of the provisions of that very section has been discussed and decided by this Court in Stoutenburgh *v.* Hennick (129 U. S. 141), where it was held that by modifying or repealing parts of this particular by-law Congress did not ratify other parts which were separately operative. This decision should dispose of this branch of the defence should it be again relied upon. But if this should be doubted it is sufficient to say that the re-enactment of the provision for assessing and taxing in bulk the capital stock of corporations by the act of March 3, 1876, a subsequent statute, renders the defendant's argument, based on this section, entirely nugatory.

II.

The provisions of the original charter in relation to taxes on the appellant's property are found in the 2d and 3d sections. The third section is as follows (12 Stat. 389):

"The said *roads* shall be deemed real estate, and they, together with other real property and the personal property of said body corporate, shall be liable to taxation *as other real estate and personal property in the cities aforesaid*, except as herein provided."

The eighth section provides—

"That the *capital stock* of said company shall be not less than three nor more than five hundred thousand dollars, and that the stock shall be divided into shares of fifty dollars each, and shall be deemed *personal property* transferable in such manner as the by-laws of said company may direct." (12 Stat. 390.)

These provisions are of but little moment in considering the present question, except that the capital stock is classified as and declared to be *personal property*, while

the roads, *i. e.*, the tracks, are to be considered as real estate. If it be true that an assessment of the capital stock of a corporation includes everything of value connected with it, whether real or both real and speculative, then this company pays its full share of the burden of taxation without this license tax.

Nearly two years after the new mode of appraising the property owned by the stockholders of corporations, an entirely new basis of taxation was established by Congress in this District, and it is general in its application, including corporations as well as other persons. In other words, the law embraces the entire subject-matter of taxation in this District. A proviso to the third section of an act of Congress entitled "An act providing a permanent form of government for the District of Columbia," approved June 11, 1878 (20 Stat. 105), establishes a fixed rate of taxation on all property in the District; it is in the following words:

"*Provided*, That the rate of taxation in any one year *shall not exceed one dollar and fifty cents* on every one hundred dollars of real estate not exempted by law; and on *personal property* not taxable elsewhere, *one dollar and fifty cents, on every one hundred dollars, according to the cash valuation thereof.*"

Here is an imperative statutory declaration that this complainant shall not be taxed on its property at a rate exceeding $1.50 on $100.00 on its property, either real or personal, in any one year. It appears from the bill that up to the time the suit was instituted the capital stock of the company had been appraised at $150.00 on each $100.00 of par value, under the acts of 1876 and 1877, and that its real estate had also been assessed, and that all of these taxes had been paid. Now it is demanded

that the company shall pay more; that a "higher rate" shall be paid in each year.

The company gets no new privilege, nor any privilege, from the municipal corporation for which it is or can be charged. It can get no part of its authority to run cars by means of the license; it received that from Congress, and by its charter it is obliged to run cars on one line every five minutes, and on the other every fifteen minutes (12 Stat. 368). The municipality possesses no power to increase any of the privileges of the company, and having exhausted its powers of taxation by assessing the property of the company, both real and personal, to the full limit of the taxation as prescribed by the above act of Congress, and by collecting the amounts so assessed, the defendants are wholly without jurisdiction to collect more.

Where a municipal corporation has reached the limit of taxation fixed by law it is without authority to assess or collect more. If authority be needed to support this proposition it will be found in—

2 Dill. on Mu. Corpns., sec. 769 [610].
Weber v. *Traubel*, 95 Ill. 427.
Webster v. *People*, 98 Ill. 343.
Jeffreys v. *Lauren*, 42 Iowa, 505.
Porter v. *Thompson*, 22 Iowa, 391.
Cooley on Tax'n, 347, 349–50.
U. S. v. *Co. of Macon*, 99 U. S. 590.

III.

The court below proceeded upon the theory that the proceedings in the police court, which are complained of, were in the nature of *criminal proceedings*, and for that reason a court of chancery was without jurisdiction to restrain or interfere with them. This position cannot be

sustained. The principal reason assigned for the doctrine that a court of equity will not enjoin criminal proceedings is that the *State* is the plaintiff and that the *State* cannot be sued. (See the authorities in 1 Bishop Cr. Pro., p. 819, § 1414.) Such a reason can have no application here. But the proceedings complained of were solely for the purpose of collecting fines and penalties imposed by a municipal by-law. If, instead of providing for the collection of these penalties in the police court, an action of debt in a common law court had been prescribed, the result would have been the same. It cannot be said that to violate the provisions of a by-law of a municipal corporation is a *crime*, and it cannot with any more reason be said that a proceeding to collect a penalty for such violation is a criminal proceeding. On this subject see the recent case of Callan *v.* Wilson (127 U. S. 540).

The object of this bill is to restrain the officers of a municipal corporation from harassing the plaintiff by continuous or periodical attempts to collect an illegal tax imposed or sought to be imposed by a municipal by-law adopted by a municipal legislature without power to legislate on the subject. Several well-established grounds of equity jurisdiction are set forth. They are well-recognized grounds of equity jurisdiction and have received the sanction of this Court over and over again. They are the following:

1. The by-law which prescribes this license tax was null and void because the legislative assembly was without authority to legislate upon the subject;

2. Even if the by-law was valid at its inception, subsequent acts of Congress have repealed it;

3. Other like proceedings instituted in the police court prior to the proceedings now sought to be restrained have been decided by the court of last resort, on appeal, in favor of the complainant;

4. To prevent multiplicity of suits and harassing efforts annually made to collect the tax complained of;

5. To prevent irreparable injury and annoyance by making unlawful and improper charges against the complainant upon the public tax-books of the District of Columbia because of public taxes alleged to be in arrears;

6. The complainant is without adequate remedy at law.

See Litchfield *v.* County of Webster, 101 U. S. 773.

In that case a bill was filed to restrain the authorities of a State from collecting a *penalty* for the non-payment of a tax and the bill was sustained.

In a case in New York where seventy-seven actions had been begun against a street railway company in a justice court by the municipal authorities of a city to recover separate *penalties* for the running of cars without a license, the question to be determined being the same in all the suits, it was regarded as appropriate to enjoin all the suits but one.

3d Ave. R.R. Co. *v.* Mayor of N. Y., 54 N. Y. 159.
See also West *v.* Mayor, &c., 10 page 539.
Page *v.* Mayor, &c., 34 Md. 558.
Porter *v.* Mayor, &c., 18 Md. 301.

The case of the Union Pacific R.R. Co. *v.* Cheyenne (113 U. S. 516) seems to be conclusive on the question of jurisdiction raised by the court below. In that case a bill was filed to restrain the collection of an illegal tax asserted to be valid and collectible by the municipality of the city of Cheyenne, which was in addition to a general tax imposed by general law. The general law was a subsequent enactment but it embraced the *entire subject* of taxation. The relief prayed was granted.

IV.

By the third section of the act of Congress approved August 6, 1890 (26 Stat. 310), this company was compelled to substitute steam for horse-power. That section is as follows:

"That any street railroad company in the District of Columbia authorized to run cars drawn by horses, which has changed or may change its motive power on any of its lines now constructed, to cable or electricity, or change its rails in accordance with the provisions of law, shall have the right to issue and sell, at the market price thereof, stock of said company to an amount necessary to cover the cost of making said changes, the cost of said changes and the amount of said stock sold, together with the price per share, to be fully set forth, under the oath of the president of said company, and filed with the Commissioners of the District. And any company availing itself of the privileges herein granted shall, within two years, wholly dispense with horses as motive power on all portions of its line and substitute therefor the power provided for in the act making appropriations for the expenses of the government of the District of Columbia, approved March second, eighteen hundred and eighty-nine, or pneumatic or other modern motive power which shall be approved by the Commissioners of the District of Columbia, but nothing in this act contained shall in anywise authorize the use of overhead appliances: *Provided, That if any such company operating a line or lines of street railroad from Georgetown or West Washington to and beyond the Capitol grounds shall fail to substitute for horse-power the power herein provided for on all its lines within two years from the date of this act, such company shall forfeit its corporate franchises.*"

If this act of the local legislature is still in force, will this company be compelled to pay a license fee to the

municipal government for each passenger and *grip* car used on its railroad and propelled by means of a cable?

It is submitted that the decree appealed from should be reversed.

ENOCH TOTTEN,
W. D. DAVIDGE,
for Appellant.

146 US 227

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OCTOBER TERM, 1892.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY, *Appellant*,
vs.
THE DISTICT OF COLUMBIA, *et al.* } No. 27.

Appeal from the Supreme Court of the District of Columbia.

BRIEF FOR APPELLEE.

GEORGE C. HAZELTON,
SIDNEY T. THOMAS,
For Appellee.

BYRON S. ADAMS, PRINTER.

Supreme Court of the United States.

OCTOBER TERM, 1892.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY, *Appellant*,
vs.
THE DISTICT OF COLUMBIA, *et al.*
No. 27.

BRIEF FOR APPELLEE.

This case presents the question, whether equity has jurisdiction to restrain proceedings on a criminal information to recover a penalty under a municipal ordinance. It is respectfully submitted that the process of injunction can not be used for any such purpose.

Snyder & Marks, 109 U. S., 550.
High on Inj., secs. 68, 272, and 1244.
In re Sawyer, 124 U. S., 200.
Mayor, &c., of York *vs.* Pilkington, 2 Atk., 302.
Montague *vs.* Dudman, 2 Vesey, Sen., 397.

The defense sought to be interposed here, by the appellant, as a ground for equitable relief was available in the Police Court of the District, and should have been interposed there.

Where the ground of relief is equally available at law equity will not interfere.

Ins. Co. *vs.* Bailey, 13 Wall., 616.
Lewis *vs.* Cock, 23 Wall., 466.
Root *vs.* Railway Co., 105 U. S., 189.
Killian *vs.* Ebbinghaus, 110 U. S., 568.

To assume such jurisdiction, or to sustain a bill for injunction to restrain proceedings on an information filed for the enforcement of a penalty, is to encroach on the domain of the courts of common law, or of the executive and administrative departments of government.

1 Spence Eq., Jur., 689, 690.

The cases cited by counsel for appellant in support of the jurisdiction of equity in this case, when examined, will be found to relate to *civil* actions. It is believed that no case can be found where equity has restrained proceedings in the nature of a criminal prosecution. Prosecutions on information to recover penalties are represented by officers of the State representing the public, and looking alike to the public interests and the punishment of the guilty. It would not be proper, therefore, for a court of equity to restrain a public officer in the discharge of what might appear to be a plain duty pertaining to his office.

II.

It is contended for the appellant that the provisions of the District License Act of 1871, and the second section of the Act of July 1, 1864 (the charter of the Metropolitan R. R. Co.), which authorized the tax complained of was repealed by an Act of Congress, approved March 3, 1877. (18 Stat., 86.)

Unfortunately for this contention, section 19 of the Act

of July 12, 1876 (19 Stat., 83), by which the tax on the capital stock of the appellant was levied, expressly repeals the following provisions of the Act of the District Assembly, by which the license tax complained of was imposed, namely: the 23d section, and clauses 20 and 35, of the 21st section, and clause 16 of said 21st section, as amended by the Act of said Assembly, approved June 20, 1872. The 23d section referred to, imposes a tax of seventy cents per hundred dollars on personal property in Washington and Georgetown, thus showing the intention of Congress to recognize and affirm the remainder of the act.

Whether there was any doubt on the point, or whether Congress merely overlooked its former action, it, nevertheless, by the Act of March 3, 1877, again repealed the 23d section, and clause 20 of the 21st section, of the District License Act of 1871.

The Washington and Georgetown Railway Company was chartered May 17, 1862 (12 Stat., 388), with the right to construct certain railway tracks and operate cars thereon, etc., *Provided*, that the use and maintenance of its road should be subject to the municipal regulations of the Cities of Washington and Georgetown. The second section of the charter provided: "That said roads shall be deemed real estate, and they together with the real and personal property of said corporate body shall be liable to taxation, as other real estate and personal property in the cities aforesaid, except as hereinafter provided." The charter of the appellant was amended by a provision of the Act of July 1, 1864 (13 Stat., p. 327) incorporating the Metropolitan Railroad Company. Section 2 of the latter Act after providing for the liability of the company to taxation in the same maner as in the earlier charter added that it should also be liable to "license for its vehicles or cars," and that "all other corporations in the District of Columbia heretofore organized for like purposes shall

be liable to pay a license, as provided in this section." By this provision the appellant became liable to pay any license tax which might be imposed by the municipal authorities, while it was liable to be taxed at the same time upon its real and personal property, including its cars, for which it paid a license.

By the Act of August 23, 1871, the District Assembly imposed the license tax complained of, of six dollars, on every street car used for carrying passengers for hire. The authority of Congress to delegate its power of taxation to a Municipal Corporation is not now open to question (United States *vs.* New Orleans, 98 U. S., pp. 392–3), nor can it be denied that the particular power in question was, as a matter of fact, delegated. It is contained in the general grant of power to the Legislative Assembly, and the use of such power is plainly provided for in the Act of Incorporation. It is submitted that such taxes do not constitute duplicate taxation, and even if they should it was plainly the intention of Congress that both might be imposed.

By the Acts of Congress approved March 3, 1875, (18 Stat., 504) and March 3, 1877, (19 Stat., 396) a new system of taxation was provided, and hence it is contended by counsel for the appellant that a repeal of the License Act of 1871 is implied; that it was the intention of Congress to provide by those laws a complete system of taxation and that, therefore, it was the legislative intention that all former provisions imposing taxes should be of no effect. It is immaterial whether the two taxes constitute duplicate taxation or not, if Congress intended it should be so. Section 19 of the Act of July 12, 1876, (19 Stat., 83) expressly repeals the 23d section, and clauses 20 and 35 of the 21st section, and clause 16 of said 21st section, of the Act of the District Assembly of August 23, 1871, and of June 20, 1872, amendatory thereof. It thus ap-

pears that the act of the Assembly in question was kept in mind by Congress in framing the new system of taxation and that the particular question of how much of that act should be repealed and how much of it should be allowed to stand was distinctly considered. Selecting a section and certain clauses for repeal, was, it seems to us, equivalent to a declaration on the part of Congress that the remainder of the law should stand. There is no ground for the claim of repeal by implication, but on the other hand, there is every reason to suppose that Congress intended to continue in force former legislation, except so far as it was expressly repealed. The license fee complained of is a tax upon the franchise of the appellant, which is a just and proper subject of taxation. The franchise conferred upon the appellant is a great and valuable one, and even though it may be liable to duplicate taxation, the burden is not great considering the magnitude of the exclusive rights and privileges conferred.

It is not perceived how the Act of Congress approved August 6, 1890, (26 Stat., 310), compelling the appellant to substitute steam for horse power and increasing the number of its cars, cited on the brief of appellant, affects the case. The decree of the court below, dismissing the bill, should be affirmed.

GEORGE C. HAZELTON,
SIDNEY T. THOMAS,
For Appellee.

146 U S 227

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CLERK.

IN THE

Supreme Court of the ~~United States~~,

OCTOBER TERM, 1892.

THE WASHINGTON & GEORGETOWN RAILROAD COMPANY,
APPELLANT,
v.
THE DISTRICT OF COLUMBIA
ET. AL.

No. 27.

Supplemental Brief for Appellant.

W. D. DAVIDGE,
ENOCH TOTTEN,
for Appellant.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1892.

IN THE

Supreme Court of the United States.

October Term, 1892.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY, APPELLANTS,

v.

THE DISTRICT OF COLUMBIA ET AL.

No. 27.

Supplemental Brief for Appellant.

This is a bill to enjoin the collection of an illegal tax, and also the prosecution of legal proceedings to recovery penalties for its non-payment. The latter object is auxiliary only, the main object being to have the tax decreed to be illegal and void.

The facts are: The appellant was incorporated by an act of Congress approved May 17, 1862 (12 Stat. 388), with the right to construct and operate street railways. Its charter required (sec. 8) that the capital stock should be not less than three nor more than five hundred thousand dollars, to be divided into shares of fifty dollars each, and declared that the capital stock should be deemed personal property. By section 2 it is enacted that the road shall be deemed real estate, and shall, together with other

real and personal property of the corporation, be liable to taxation as other real estate and personal property. By the charter, the franchise of the corporation was not declared taxable, but the charter being made subject to alteration and amendment (sec. 6), Congress, by a subsequent act, dated July 1, 1864 (13 Stat. 327), which incorporated the Metropolitan Street Railway Company, declared that said company and "all other corporations in the District of Columbia, heretofore organized for like purposes, shall be subject to pay license as provided in this section." In this way the appellant became liable to pay any license tax which might be imposed by the municipal authorities. On August 23d the then government of the District of Columbia imposed a license tax of six dollars for every car used for carrying passengers for hire. After the passage of this law the appellant was subject to taxation for its real property, personal property, and also the license tax, and this state of things continued until Congress, by an act approved March 3, 1875 (18 Stat. 504), re-enacted by two other acts, dated July 12, 1876 (19 Stat. 83), and March 3, 1877 (19 Stat. 396), made a radical change in the whole system of taxation in respect of corporations having a capital stock.

Instead of the taxes on real property, personal property, and the franchise, the last in the form of the license tax then subsisting, it was provided that the capital stock should be appraised and a tax levied upon such appraised value.

The change thus made subjected to taxation all the elements entering into the value of the capital stock—all property, real and personal, and also the franchise, and indeed whatever could give value to the capital stock.

The act of 1876 required the assessed value of all real estate to be deducted, and further declared that all laws

inconsistent with its provisions should be repealed (sec. 12). After the new system of taxation was established, the capital stock of the appellant was duly appraised at its value in bulk and the tax paid.

No tax was ever assessed against the personal property, it being conceded by the municipal authorities that, as to it, the new system operated a repeal by necessary implication. But in respect to the license tax, notwithstanding the franchise was taxed as part of the capital stock and stood upon the identical footing of the tax on personal property conceded to be repealed, the tax was claimed, and, the apellant refusing to pay it, proceedings were instituted by information in the police court to recover the penalties provided in case of non-payment. The information thus brought was decided in that court against the appellant, but this judgment was reversed by the criminal court, the tribunal of last resort. Another proceeding by information was then brought in the police court and decided against the appellant, and an appeal taken to the criminal court. Pending this appeal, the information was dismissed by the appellee. Two other informations were subsequently brought and were pending when the appellant filed its bill to enjoin the collection of the tax and the pending proceedings. The bill was demurred to, and at the hearing in special term, before Mr. Justice James, the demurrer was sustained and the bill dismissed. A copy of the opinion of Mr. Justice James is filed with this brief. The demurrer was decided by Judge James upon the merits, and not on the ground of want of jurisdiction. On appeal to the court in general term, that court, without considering the merits, affirmed the decree below dismissing the bill upon the ground solely that the bill was brought for the purpose of enjoining *quasi* criminal proceedings, and hence was beyond the jurisdiction of a court of equity.

The case before this court involves two questions:

First. Was the license tax in respect of stock corporations repealed by implication?

Second. If so, was the appellant entitled to relief by injunction?

Before proceeding to these questions a word as to the decision in general term. It assumes that the only object of the bill was to enjoin the pending legal proceedings. So far from this being the case, the bill sought also to restrain the appellee from collecting the license tax, averred to be illegal and void, and also from charging up or entering upon the books of the appellee against the appellant any sum or sums on account of said license tax (see prayer of bill).

It thus appears that the court below dismissed the bill on a ground applicable only to part of the case as made. Even if there was no jurisdiction to enjoin the pending proceedings, that did not justify the dismissal of the bill if the tax was illegal and void, and the court had jurisdiction to restrain its collection.

First. Was the license tax in respect of stock corporations repealed by implication?

1. The acts of Congress, principally that of 1876, embrace the whole subject of taxation. It established a new system, organically different from what had before existed in respect of stock corporations. It discriminated in terms between corporations without and with stock, as conceded by Mr. Justice James. As to the former, it dealt with them as with natural persons; as to the latter, instead of making real and personal property and franchises directly the subject of taxation it imposed a tax upon the representatives of those subjects, that is, upon the appraised value of all the shares constituting the capital stock. Such a new system is necessarily repugnant to the former system. By

the new system, a different rule or method of taxation is prescribed, and such new rule declaring how the taxation shall be made is necessarily exclusive of any other rule. To this effect have been the repeated decisions of this Court.

When two acts are not in express terms repugnant, yet if the latter covers the whole subject of the former and introduces new provisions, it will operate as a repeal of the former.

U. S. *v.* Tynen, 11 Wall. 88–92.
Dist. of Col. *v.* Hunton, 143 U. S. 18, 26.
Eckloff *v.* Dis. of Col., 135 U. S. 240.
Murdock *v.* Memphis, 21 Wall. 590, 617.
Tracy *v.* Tupley, 134 U. S. 206, 223.
Fisk *v.* Henarie, 142 U. S. 459,

and see particularly Union Pacific Railway Company *v.* Cheyenne, 113 U. S. 516, where the former act was special and local and the latter general.

And even where the latter statute is not repugnant in all its provisions to the former, yet, if the latter statute intends to prescribe *the only rule* which shall govern, it repeals the former.

State *v.* Stall, 17 Wall. 425.
Davies *v.* Fairbairn, 3 How. 636.
U. S. *v.* Chaplain, 97 U. S. 546.
Cook Co. Nat. Bank *v.* U. S., 107 U. S. 445.

It is true the language of the latter statute in the present case is affirmative; but "affirmative words may and often do imply a negative, not only of what is not affirmed, but of what has been previously affirmed, and as strongly as if expressed. An affirmative enactment of a new rule implies a negative of whatever is not included or is different, and if by the language used a thing is limited to be done

in a particular form or manner, it includes a negative that it shall not be done otherwise."

Sutherland on Statutory Constructions, § 140.

But the latter here is not to be regarded as affirmative only. The 14th section of the act of 1876 declares that "all other laws and acts or parts thereof inconsistent herewith be, and the same are hereby, repealed." Such a provision in a statute, declaring what shall be done and how it shall be done, is an express negation of any other mode than that declared.

Sutherland on Statutory Constructions, § 147; also § 146.

An examination of the new system in question will show that where it was intended to preserve any part of the old system there was an affirmative declaration to that effect; thus, when real estate taxed against the corporation is sought to be partially excluded from the operation of the new system, there is an affirmative declaration that its value shall be deducted from the appraised value of all the shares of capital stock.

2. The conclusive argument in favor of the repeal in this case of the former statute is, that to hold otherwise would impute to Congress the intention to impose upon stock corporations double taxation from which all natural as well as all other corporations were left free.

Such a construction is not to be tolerated unless required by express words or necessary implication.

Cooley on Taxation, 2d Ed., 227 *et seq.*

By the law of Maryland in force when this District was ceded, the injustice of duplicate taxation was not a mere principle to be applied by courts in the construction of statutes, but a positive rule deemed of such importance

as to occupy a place in the organic law, and the failure to comply with which rendered any statute null and void.

Declaration of Rights, 1 Kilty's Laws of Mrayland, § 13.

County Commrs. *v.* Bank, 48 Md. 117, and cases cited p. 119, and so on.

State *v.* R.R. Co., 40 Md. 22, 50.

State *v.* Sterling, 20 Md. 502, 520.

And although since the cession the provision of the Declaration of Rights above referred to no longer exists as a rule of constitutional law binding upon the law-making power, it is none the less part of the jurisprudence of this District as a rule of municipal law adopted by Congress, and of which the repeal or violation is not to be presumed in the absence of express words or necessary implication.

Then, would the taxation be double if the license tax be held to be in force?

To tax the whole capital stock at, not its *nominal*, but appraised value, and then to tax an element, the franchise, entering into the value of the capital stock, is surely double taxation. It is to tax the whole, and then to tax again a part making up that whole. It is to tax the representative of a thing, and then to tax the thing itself. Perhaps the largest element in the value of the capital stock of the appellant is the franchise.

Cooley on Taxation, 2d Ed., 227–234.

Provident Institution *v.* Mass., 6 Wall. 611.

The license tax is indubitably a tax upon the franchise, and this by whatever name it may be called, license or privilege or what not. Attention is asked to the case of the County Commrs. *v.* Bank (48 Md. 117), where the shares of stock of a bank were taxed at their appraised value, and also certain property belonging to the bank.

Held, the State could tax either the thing or its representative; it could not do both. In this case all the Maryland authorities are reviewed. The learned judge who decided this case at special term likened it, in his opinion, to the case of a tax paid by a merchant for a license or privilege to do business and another tax upon his business. It is submitted that the illustration does not apply, as the two things taxed are essentially different; one is not in any sense the representative of the other.

As will be seen by the above opinion, it is conceded by the District authorities that the effect of the above act of Congress was to repeal the tax on personal property. If that be so, how can the conclusion that the license tax in question was repealed be avoided? How is it possible to discriminate between the tax upon the franchise and that upon personalty? The franchise and the personal property are alike represented by the appraised value of the capital stock, and the exemption of the latter seems necessarily to involve that of the former.

By the license tax the franchise or its use was only in part taxed and in a manner prescribed—that is, by a tax upon the right to run the cars.

By the acts of Congress the whole franchise was taxed, as it necessarily entered and indeed was the principal part of the appraised value of the capital stock. It will be observed that the license tax is not, as will appear by reference to the ordinance, a mere petty charge incidental to police regulations, but, on the contrary, a revenue tax. The opinion of the court in special term rests upon the proposition that because the act of 1876 recognized the continued existence of the license ordinance, Congress could not have intended to repeal that ordinance; but this, it is submitted, is a fallacy. The ordinance relates to many subjects, separable in their nature, and the argument

is that because the act of 1876 recognized the continued existence of the license law in some respects, therefore, its continued existence was recognized in all. It has never been contended that *all* the provisions of the license law were repealed by the act of 1876, but only those provisions repugnant to the new system and the new rule established. The argument, to be complete, requires the recognition of the continued existence of the license law in respect of stock corporations, which is not and cannot be contended. The same argument was made in Stoutenberg *v.* Hennick (129 U. S.), in respect of the same license ordinance, but repudiated by this Court.

Opinion of Mr. Chief-Justice Fuller, p. 149.

Second. Was the appellant entitled to relief by injunction ?

That the case made by the bill and admitted by the demurrer was within the jurisdiction of equity, was not questioned at all by Mr. Justice James, nor by the court in general term, except so far as the bill was regarded by the latter court as a bill to restrain *quasi* criminal proceedings. The appellant is a corporation, holding a franchise, in which the public has an interest, praying relief against an illegal tax and harassing and annoying litigation. By the 17th section of the act of Congress of May 17, 1862(12 Stats. 388) by which the appellant was incorporated, the corporations of Washington and Georgetown, of which the appellee is the successor, are expressly "prohibited from doing any act or thing to hinder, delay, or obstruct the construction or operation of said railroad as herein authorized." The case made by the bill and admitted by the demurrer is one of vexatious litigation and multiplicity of suits after a judgment of the court of last resort establishing the right claimed by the appellant, which judg-

ment is not assailed on any ground of law or fact. The bill avers that all questions involved in the pending information were argued and considered by the court which rendered the judgment, and this is admitted by the demurrer. It is, however, said that the ordinance is penal and hence a court of equity has no jurisdiction. Attention has already been called to the fact that the relief prayed extends beyond an injunction to restrain the prosecution of the pending informations.

With respect to the alleged criminal or *quasi* criminal character of the pending proceedings, it is conceded that the subject-matter of the jurisdiction of a court of equity is civil property, and that it has no jurisdiction in matters merely criminal or *quasi* criminal which do not affect property. It is submitted, however, that the question whether the pending proceedings be criminal or *quasi* criminal depends upon the nature of the proceedings and not upon whether a municipality has or has notseen fit to attach a penalty to an ordinance. Such a penalty may be attached to an ordinance relating solely to property and civil rights, and without any element of a criminal or *quasi* criminal character. The jurisdiction of equity depends upon settled rules and principles of law and not upon the mere fact whether a municipality has or has not sought to enforce an ordinance by means of a penalty. The sovereign authority may delegate power to a municipality for many purposes, but such delegation, if it could be made at all, is not to be presumed in respect of the limits of equity jurisdiction. If an ordinance in substance and fact relates to property or civil rights, a proceeding under it does not become criminal or *quasi* criminal because a penalty is attached. The question in the present case is the legality of a license tax. The appellee says it should be paid, and

this claim is denied by the appellent. Such is the whole controversy, and it involves essentially a civil right, and if the enforcement of the ordinance be a criminal or *quasi* criminal proceeding it is such solely by reason not of its real nature, but of the penalty. It is useless, however, to discuss this matter further, as the acknowledged exception to the general rule disposes of the present case.

Mr. Kerr, after laying down the general rule, proceeds as follows: "But if an act which is criminal touches also the enjoyment of property, the court has jurisdiction; but its interference is founded solely on the ground of injury to property."

Kerr's Injunctions in Equity, 2.

And Lord Hardwicks decided the same thing in Mayor of York *v.* Pilkington (2 Atk. 302) cited with other cases, note (f.)

Thus, the rule is that a court of equity will interfere wherever injury to property, whether actual or prospective, is shown, notwithstanding the criminal or *quasi* criminal nature of the proceeding sought to be enjoined.

To this effect see—

Shinkle *v.* Covington, 83 Ky. 420.
3d Avenue R.R. *v.* New York, 54 N. Y. 159.
Wood *v.* Brooklyn, 14 Barb. 425.
Port of Mobile *v.* R.R. Co., 84 Ala. 115.
City Counsel *v.* Louisville R.R. Co., 84 Ala. 127.
Atlanta *v.* Gas Co., 71 Ga. 106.
Des Planes *v.* Poyer, 123 Ill. 388.
West *v.* Mayor of New York, 10 Paige, 539.
Eldridge *v.* Hill, 2 John. Ch. Rep., 281.
High on Injunction, §. 68.

And especially will a court of equity interfere after the

party seeking its aid has successfully established his right at law.

Oakley *v.* Mayor of New York, *supra.*
Eldridge *v.* Hill, New York, *supra.*
3d Avenue R.R. *v.* New York, *supra.*

Reliance is placed by the brief of the other side upon the case *In re* Sawyer (124 U. S. 200).

It is sufficient to say in reply that the present question was not involved in that suit, and that what is there stated is in relation to the general rule as to criminal and *quasi* criminal proceedings. The court had no occasion to pass upon and did not, in fact, pass upon the present question.

We submit that the decree of the court below should be reversed.

W. D. DAVIDGE,
ENOCH TOTTEN,
For Appellant.

Opinion of Mr. Justice James, Referred to Above.

WASHINGTON AND GEORGETOWN RAILROAD COMPANY *against* THE DISTRICT OF COLUMBIA.	In Equity.	No. 9,189.

The demurrer to the bill in this cause raises the question whether the 26th paragraph of the act passed by the legislative assembly of the District of Columbia on February 21, 1871, and entitled "An act imposing a license on trades, business, and professions practiced or carried on in the District of Columbia," is still in force as against the complainant.

That paragraph is in the following words: "The proprietors of hacks, cabs, and omnibuses and street cars, and other vehicles for transporting passengers for hire, shall pay annually as follows: Hacks and carriages, ten

dollars; one-horse cabs, six dollars; omnibuses, ten dollars; street cars, six dollars; on other vehicles, capable of carrying ten passengers or more at any time, ten dollars." The fourth section of the act imposed a penalty of not less than five nor more than fifty dollars for any failure to pay this license tax. The bill states that the Commissioners of the District of Columbia have repeatedly caused proceedings to be had by information against the complainant before the police court to recover this penalty, and that it has in such cases been enforced by that court, and complainant now prays an injunction to restrain the District and its officers from further harassing the complainants by any proceedings to compel the payment of said license tax, on the ground that such payment is no longer required by law. In order to consider the validity of this claim it is necessary to review legislation concerning this corporation.

The Washington and Georgetown Railroad Company was incorporated by an act of Congress approved May 17, 1862 (12 Stat. 388), with the right to construct and maintain certain roads, and "to run public carriages thereon, drawn by horse-power, receiving therefor a rate of fare not exceeding five cents a passenger for any distance between, &c.: *Provided*, That the use and maintenance of said road shall be subject to the municipal regulations of the cities of Washington and Georgetown respectively." The second section of the act provided: "That said roads shall be deemed real estate, and they, together with other real property and personal property of said corporate body, shall be liable to taxation as other real estate and personal property in the cities aforesaid, except as hereinafter provided." The 6th section provided that the act might "at any time be altered, amended, or repealed by Congress." It was so amended by a provision of the act of July 1, 1864 (13 Stat. 327), which incorporated the Metropolitan Street Railroad Company. Section 2 of the latter act, after providing for the liability of that company to taxation in the manner as in the earlier charter, added that it should also be liable to "license for its vehicles or cars," and that "all other corporations in the District of Columbia, heretofore

organized for like purposes, shall be subject to pay license, as provided in this section." By this provision the complainant became liable to pay any license tax which might be imposed by the municipal authorities, while it was liable to be taxed, at the same time, upon its real and personal property, including the cars for the use of which it paid license.

By the act of August 23, 1871, the legislative assembly imposed the license tax, already referred to, of six dollars for every car used for carrying passengers for hire. The bill denies the validity of this ordinance as applied to the complainant. The power of Congress to delegate its exclusive power of taxation to a municipal government, as an instrumentality for the better administration of government in matters of local concern, is not open to question (*United States* v. *New Orleans*, 98 U. S. 392, 393 ; nor can it be denied that the particular power in question was, as a matter of fact, delegated. It is included in the general grant of power to the legislative assembly, and the use of such power is plainly provided for in the act of incorporation. It is there declared that the personal property of this corporation, including its cars, should be liable to taxation, and that this same property should at the same time be liable to license tax. It may be observed here that such taxes do not constitute duplicate taxation, and that, even if they should, it was nevertheless the intention of Congress that both might be imposed. In accordance with this authority the legislative assembly, by section 23 of the same act, imposed on all personal property in the District, including of course that of complainant, a tax of seventy cents on each hundred dollars, and by another act, passed on the same day (chapter 75), a tax on real estate in Washington of one dollar and seventy cents, and on real estate in Georgetown of ninety-five cents. This also applied to the property of complainant.

Finally, by the acts of Congress approved March 3, 1875 (18 St. 504), and July 12, 1876 (19 St. 83), and March 3, 1877 (19 St. 396), a new system for the taxation of real and personal property in the District was provided. By these successive acts a tax of one dollar and fifty cents on

each one hundred dollars of valuation was imposed generally on all real estate and personal property. It was provided in each act that lists for return of taxable personal property should be furnished by the assessors to all persons, firms and corporations. In each the next succeeding section provided for the manner of imposing the tax on corporations which issued stock. That section in the act of 1876 was in the following words: "The capital stock of all corporations in said District, not herein exempted, shall be appraised in bulk, and the corporations issuing the same shall be liable for the tax thereon according to such value, and the shares in the same shall not be assessed against the individual owners thereof; but from the appraised value of the stock shall be first deducted the value of any real estate of said corporation in said District, which shall be separately taxed against the said corporation." The same provision was made by section eleven of the act of 1877, and, with the exception of so much as related to the separate shares, by the act of 1875.

The general provision imposing a tax on all personal property, and the provision that corporations, as well as individuals, should return a list of taxable personal property, would, if considered alone, apply to the tangible personal property of such corporations as the complainant; but it was understood by the District authorities not to be the intention of Congress that it should so apply in cases when a tax was imposed on capital stock in bulk and at its actual value. Complainant has accordingly been assessed only in respect of its capital stock and real estate, while the license tax, like the license taxes imposed by the legislative assembly upon other owners of taxed property, was also demanded. Complainant has refused to pay this tax on its business on the ground that capital stock at value represents not only tangible personal property, but the enjoyment of its franchise of carrying passengers for hire—in other words, its business; that consequently a tax on such capital stock at value is, among other things, a tax on this business; that a license tax would therefore constitute duplicate taxation, and that the legislature must be presumed not to intend that duplicate tax-

ation should occur. It is urged, therefore, that a repeal of this license tax must be implied. An implied repeal was claimed also on another principle, namely, that it was the intention of Congress to provide, by these new laws, a complete system of taxation, and that therefore it was the legislative intention that all former provisions imposing taxes should be of no effect.

Since it is immaterial whether the two taxes constitute duplicate taxation or not, if Congress actually intended that both should stand, it is not worth while to consider whether they are duplicate until we ascertain whether there is affirmative evidence of an intention that the license tax should remain in force.

Section 19 of the act of 12 July, 1876 (19 St. 83), by which this tax on the capital stock of complainant was imposed, expressly repeals the following portions of the act of the legislative assembly, by which the license tax in question had been imposed, namely, the 23d section, and clauses 20 and 35 of the 21st section, and clause 16 of said 21st section as amended by the act amendatory thereof approved June 20, 1872. The 23d section referred to imposed a tax of seventy cents per hundred dollars on personal property in Washington and Georgetown, and clauses 20 and 35 of the 21st section are as follows:

"20. Dealers in merchandise of any kind whatsoever, not otherwise provided for, shall pay annually four dollars of each thousand dollars, or proportional part thereof, of capital invested in business: *Provided*, That no license shall be for a less sum than five dollars."

"35. Photographers shall pay annually twenty dollars."

* * *

It appears, then, that this very act of the legislative assembly was kept in mind by Congress in framing the new system of taxation, and that the particular question, as to how much of that act should be repealed and how much should be allowed to stand, was distinctly considered. I think that, when certain clauses were selected for repeal, this court can put but one construction upon the omission of Congress to repeal any other clauses. Such a selection for express repeal was equivalent to an express

declaration that the other clauses should stand. And this, as I think, is a complete answer to both of the propositions on which an implied repeal of so much of clause 26 as related to a license tax on street railway cars is claimed. If it be true that the result is duplicate taxation, there is nevertheless no room for an implication that Congress intended that such taxation should not be imposed. I am bound to understand that they had that very question before them, and decided that, duplicate or otherwise, both taxes should stand. That view must dispose of the argument which founds a repeal upon the legal presumption against duplicate taxation, since presumption cannot be resorted to in a case of plain intent. The other proposition, that Congress intended to provide, by the new statute, a complete system, and therefore by implication did away with all former provisions for taxation, must fail for the same reason. This plain indication, equivalent to an express declaration, that the whole system of license taxes, except so far as some of its details were expressly repealed by the very act which established the new system, shows that the latter was not intended to be exhaustive of the subject of taxation, but was intended, on the contrary, to be complete only with the assistance of the former legislation. It was, by these references to the license law, indicated, almost in express terms, that the two laws taken together were to constitute the system of taxation. I find no ground, therefore, for any implication of repeal, but ample ground for a conclusion that there was a plain intent to continue in force the former legislation, except so far as it was expressly repealed.

I had carefully examined numerous authorities touching the question of duplicate taxation, and the actual nature of the tax imposed on stock corporations by the acts of 1876 and 1877; but, with the views which I have just expressed, I have not deemed it necessary to discuss these questions. The language of the eleventh section of these acts is peculiar, and may seem to leave room for a question whether the tax is laid on the stock as the representative of all the rights and privileges, as well as of the tangible property of the corporation, and therefore, among